

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 25 Foreign Acquisitions

Subject: 25.1 Buy American Act

PURPOSE: This standard practice (SP) describes the subcontract requirements of the Buy American Act.

POLICY: In accordance with the Buy American Act, the Laboratory will provide a preference for domestic end products for supplies acquired for use in the United States and for construction materials to be used in construction subcontracts performed in the United States.

SCOPE: This SP applies to all subcontracts exceeding \$2,500 for supplies or construction materials to be used within or outside of the United States.

DEFINITIONS:

Component Component means an article, material, or supply incorporated directly into a construction material or end product.

Construction Material Construction material means an article, material, or supply brought to the construction site by a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Laboratory are supplies, not construction material.

Domestic Construction Material Domestic construction material means:

- An unmanufactured construction material mined or produced in the United States; or
- A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 25 Foreign Acquisitions

Subject: 25.1 Buy American Act

Domestic End Product

Domestic end product means:

- An unmanufactured end product mined or produced in the United States; or
- An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the Government determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

End Product

End product means supplies delivered as a line item of a subcontract.

Foreign Construction Material

Foreign construction material means a construction material other than a domestic construction material.

Foreign End Product

Foreign end product means an end product other than a domestic end product.

United States

United States means the 50 States and the District of Columbia, United States territories and possessions, Puerto Rico, the Northern Mariana Islands, and any other place subject to United States jurisdiction, but does not include leased bases.

PROCEDURES:

Buy American Act Requirements

The procurement specialist may acquire a foreign end product for use in the United States and permit foreign construction material to be used under subcontracts for construction in the United States, without regard to the restrictions of the Buy American Act (41 USC 10a-10d), if:

- The Government has determined an end product or construction material to be nonavailable (see list at FAR 25.104);

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 25 Foreign Acquisitions

Subject: 25.1 Buy American Act

- The procurement specialist determines that a domestic end product or construction material satisfying the Laboratory's requirements is not reasonably available (excluding end products and construction materials for which the Government has made a nonavailability determination), subject to the waiver approval requirements specified in this SP;
- The cost of the domestic end product or construction material would be unreasonable;
- DOE determines that domestic preference would be inconsistent with the public interest because of an agreement with a foreign government that provides a blanket exception to the Buy American Act; or
- When the lowest acceptable offer for a domestic end product or construction material exceeds the lowest acceptable offer for a foreign end product or foreign construction material, inclusive of duty, by:
 - More than 6% if the domestic offer is from a large business, or
 - More than 12% if the domestic offer is from a small business concern.

A form entitled *Buy American Act Price Evaluation* is available to evaluate and compare the foreign and domestic prices.

The procurement specialist must also use the 12% factor in small business set-asides if the lowest acceptable offer is from a small business concern offering the product of a small business concern that is not a domestic end product.

- The purchase is for information technology (IT) that is a commercial item and is funded from fiscal year appropriations for a year for which IT is excluded (see FAR 25.103(e)).

Waiver of the Buy American Act

The procurement supervisor must approve all requests for waiver of the Buy American Act. The Procurement Manager, or designee, and DOE must approve all requests for waiver of the Buy American Act for end products or construction materials exceeding \$100,000 for which:

- No known domestic end products can satisfy the Laboratory's requirement or
- It would be impractical or inconsistent with the public interest to apply the restrictions of the Buy American Act.

A form entitled *Request for Determination – Supplies of Foreign Origin* is available for procurement specialists to document and

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 25 Foreign Acquisitions

Subject: 25.1 Buy American Act

obtain signatures for waiver of end products of foreign origin.

A form entitled *Request for Determination – Foreign Construction Materials* is available for procurement specialists to document and obtain signatures for waiver of foreign construction materials.

DOE Documentation Requirements — The request to DOE for waiver of the Buy American Act requirements must include the following:

- A definitive statement from the procurement specialist regarding the nonavailability of a suitable and usable domestic end product or construction material. A description of the reasonable effort (including use of a market survey and research of previous purchases) made to ensure that a suitable domestic end product or construction material is not available;
- Verification by the procurement specialist of any statement that a requester makes regarding the lack of a suitable domestic end product or construction material;
- A description of the foreign end product or construction material to be purchased;
- The name of the subcontractor from which the foreign end product or construction material will be acquired;
- The itemized cost of the foreign end products or construction materials;
- The reason for restricting competition, if applicable; and
- Affirmation in the request that the procurement supervisor has approved the request for waiver.

REVIEWS/ APPROVALS:

Procurement Supervisor

Procurement supervisor approval is required for all waivers of the Buy American Act, regardless of the amount of the subcontract.

DOE

DOE approval of a waiver of the Buy American Act is required for the following:

- End products or construction materials exceeding \$100,000 for which no known domestic end products can satisfy the Laboratory's requirement or
- End products or construction materials exceeding \$100,000 in which it would be impractical or inconsistent with the public interest to apply the restrictions of the Buy American Act.

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 25 Foreign Acquisitions

Subject: 25.1 Buy American Act

RESPONSIBILITIES:

**Procurement
Specialist**

The procurement specialist is responsible for:

- Purchasing domestic end products and domestic construction materials, when possible;
- Determining when it is necessary or cost effective to acquire foreign end products or permit the use of foreign construction material, and documenting all decisions to do so; and
- Obtaining approval for all waivers of the restriction of the Buy American Act from the procurement supervisor and DOE, as required.

REFERENCES:

Prime Contract Clause I.33, Buy American Act - Supplies

Prime Contract Clause I.34, Buy American Act - Construction Materials

Prime Contract Clause I.114(g), Contractor Purchasing System